IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 19, 2008 Session

GIBBY GILBERT'S DRIVING RANGE, LLC v. L.B. AUSTIN IV, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 03-C-1481 W. Neil Thomas III, Judge

No. E2007-01497-COA-R3-CV Filed June 23, 2008

Lessor leased Lessee a portion of a tract of land for the operation of a golf driving range. The parties' agreement provided that if Lessor received a bona fide offer to purchase the tract, Lessee would have a right of first refusal. Later, Lessor received an offer of purchase and notified Lessee of the amount offered, as required by the lease. Lessee declined the offer. Subsequently, the property was sold, but for an amount less than the amount originally offered. Before Lessee discovered that it had not been offered the right of first refusal as to the actual sale amount, Lessee executed an agreement terminating the lease in consideration of monies received from the Lessor. After learning of the actual sale price, Lessee filed suit against Lessor for breach of contract upon the ground, inter alia, that Lessor had failed to offer Lessee the right of first refusal as required under the lease. The trial court granted summary judgment in favor of the Lessor upon determining that the undisputed facts established that the execution of the lease termination agreement and Lessee's acceptance of consideration under such agreement constituted an accord and satisfaction and that Lessee was thereby estopped from enforcing its previous rights under the lease, all such rights having been waived. Upon careful review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

H. Wayne Grant and Scott H. Grant, Chattanooga, Tennessee, for the appellant, Gibby Gilbert's Driving Range, LLC.

N. Darrell Bridges, Chattanooga, Tennessee, for the appellee, L.B. Austin IV, individually, and L.B. Austin IV, Trustee.

OPINION

I. Background

On October 2, 2000, L.B. Austin IV ("Lessor") and Gibby Gilbert's Driving Range, LLC ("Lessee") entered into an agreement ("the lease") with a 15 year term for the lease of approximately 23 acres in Chattanooga, Tennessee, where the Lessee would operate a golf driving range, pro shop, and other golf-related activities.

Less than a year later, on July 19, 2001, the Lessor entered into a contract ("the contract") to sell 106 acres, including the leased 23 acres to the Church of Christ, Hixson, Tennessee ("the Church"). The lease contained certain provisions that were applicable in the event of a sale of the property during the term of the lease:

Paragraph 33 of the lease provided in pertinent part as follows:

> If Lessor receives a bona fide written offer to purchase all or part of the property herein leased, which offer Lessor intends to accept, then Lessor shall so notify Lessee and Lessee shall have 30 days from the date of said notice to match the offer by notifying Lessor in writing of his intent to do so.

Further, paragraph 34 provided the following:

> If Lessor receives an offer to purchase all or part of the property herein leased, and if Lessee declines to exercise his Right of First Refusal as allowed in Paragraph 33 above, then Lessor may buyout [sic] the remainder of Lessee's term.

The lease provided for payment of $160,000 if the buyout occurred in the second year of the lease.

The contract for the sale of the property to the Church included, among other things, a sales price of $1,400,000; the right of the Church, before closing, to conduct a feasibility study to determine the property's suitability for its purposes; and an acknowledgment of the Lessee's right of first refusal under the lease.

On or around July 19, 2001, the Lessor notified the Lessee in writing that the Lessor had received a bona fide offer to purchase the 106 acres. A copy of the sales contract, setting forth the $1,400,000 purchase price was attached to the letter. Referencing paragraph 33 of the lease, the Lessor's letter reminded the Lessee that it had 30 days to match the offer or the Lessor would proceed with the contract. On July 22, 2001, the Lessee declined the offer in writing to the Lessor.

The sale of the property to the Church was closed on March 12, 2002. However, the sales

price was $1,095,000 - not $1,400,000. The Lessor did not notify the Lessee of this downward adjustment of the purchase price before the closing. The closing was attended by C.L. Gilbert III, who shares ownership of Gilbert's with his father. At the closing, C.L. Gilbert III executed an agreement terminating the lease of the 23 acres and, in accordance with the previously noted lease terms, received a buyout check for $160,000. The lease termination agreement stated in pertinent part as follows:

> IN CONSIDERATION of the sum of One Dollar ($1.00), cash in hand paid, and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged;
>
> We, L.B. Austin IV, individually and as Trustee, as Lessor, and GIBBY GILBERT'S DRIVING RANGE, LLC, as Lessee, do hereby terminate that certain Driving Range Lease, a copy of which is attached hereto as Exhibit A.

The Lessee asserts that it learned that the property sold for $1,095,000, and not $1,400,000, after it signed the lease termination agreement. On September 2, 2003, the Lessee sued the Lessor for breach of the lease, seeking damages for breach of contract, alleging among other things that the Lessor had not afforded the Lessee the opportunity to exercise its right of first refusal to purchase the leased premises nor all of the real estate at the lower price of $1,095,000 as was required under the Lease.

Thereafter, the Lessor filed a motion for summary judgment which was granted by the trial court. Inter alia, the trial court held as follows:

> The Plaintiff's full knowledge of the effect of the execution of the lease termination agreement and the clear and unambiguous language of the agreement created an enforceable contract. The signing of the agreement and the acceptance of the check by the Plaintiff constituted a waiver by the Plaintiff of all rights that existed under the lease . . . . Upon the signing of the lease termination agreement combined with the acceptance of the check, the accord and satisfaction was completed and all former duties of the parties were extinguished and that contract was fully performed.
>
> With respect to the language of Paragraphs 33 and 34 of the lease, the [P]laintiff did not raise any issue with regard to the terms of the lease during the period of the negotiation of the Real Estate Sales contract which included the leased premises. Furthermore, no issue was raised by the Plaintiff prior to the signing of the lease termination agreement and acceptance of the $160,000.00 offered as full satisfaction of the terms of the lease. Accordingly, the actions of the Plaintiff during the

> negotiation period of the real estate sales contract additionally served to waive any rights he may have raised and sequentially he is estopped from enforcing those rights.

The Lessee appeals this judgment.

II. Issue

The issue we address is whether the trial court erred by granting summary judgment to the Lessor.

III. Analysis

A. Standard of Review

Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues. *See* ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); ***Airport Props. Ltd. v. Gulf Coast Dev., Inc.,*** 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). They are appropriate only when the facts material to the dispositive legal issues are undisputed. Accordingly, they should not be used to resolve factual disputes or to determine the factual inferences that should be drawn from the evidence when those inferences are in dispute. *See* ***Bellamy v. Federal Express Corp.,*** 749 S.W.2d 31, 33 (Tenn. 1988).

To be entitled to a summary judgment, the moving party must demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; ***Byrd,*** 847 S.W.2d at 210; ***Planet Rock, Inc. v. Regis Ins. Co.,*** 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). A summary judgment should not be granted, however, when a genuine dispute exists with regard to any material fact. ***Seavers v. Methodist Med. Ctr.,*** 9 S.W.3d 86, 97 (Tenn. 1999); ***Hogins v. Ross,*** 988 S.W.2d 685, 689 (Tenn. Ct. App. 1998). Our task on appeal is to review the record to determine whether the requirements for granting summary judgment have been met. *See* ***Hunter v. Brown,*** 955 S.W.2d 49, 50-51 (Tenn. 1997); ***Aghili v. Saadatnejadi,*** 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997). Tenn. R. Civ. P. 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see* ***Byrd***, 847 S.W.2d at 210; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See* ***Anderson v. Standard Register Co.***, 857 S.W.2d 555, 559 (Tenn. 1993). A party seeking a summary judgment must demonstrate the absence of any genuine and material factual issues. ***Byrd***, 847 S.W.2d at 214.

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See* ***Byrd*** 847 S.W.2d at 215; ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997). The non-moving party may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials (depositions, answers to

interrogatories, and admissions on file) provided by Rule 56.06 showing that there is a genuine issue for trial. If the non-moving party does not so respond, then summary judgment, if appropriate, shall be entered against the non-moving party. Tenn. R. Civ. P. 56.06.

Summary judgments do not enjoy a presumption of correctness on appeal. *See* ***Nelson v. Martin,*** 958 S.W.2d 643, 646 (Tenn. 1997); ***City of Tullahoma v. Bedford County,*** 938 S.W.2d 408, 412 (Tenn. 1997). Accordingly, when we review a summary judgment, we view all the evidence in the light most favorable to the non-movant, and we resolve all factual inferences in the non-movant's favor. *See* ***Luther v. Compton,*** 5 S.W.3d 635, 639 (Tenn. 1999); ***Muhlheim v. Knox County Bd. of Educ.,*** 2 S.W.3d 927, 929 (Tenn. 1999). A summary judgment will be upheld only when the undisputed facts reasonably support one conclusion – that the moving party is entitled to a judgment as a matter of law. *See* ***White v. Lawrence,*** 975 S.W.2d 525, 529 (Tenn. 1998); ***McCall v. Wilder,*** 913 S.W.2d 150, 153 (Tenn. 1995).

B. Accord and Satisfaction

The trial court found, as a matter of law, that the execution of the lease termination agreement and the acceptance of the lease buyout payment was a waiver of the Lessee's right of first refusal and constituted an accord and satisfaction of all the Lessee's rights under the lease agreement. The Lessee contends that when it signed the lease termination agreement, it did not know that the sales price was the lower amount of $1,095,000 and in order for there to have been a waiver and an accord and satisfaction, it must have been aware of the conditions under which it accepted payment for its agreement to terminate the lease.

Accord and satisfaction is an affirmative defense, and the burden of proving this defense rests squarely on the party asserting it. ***Inland Equip. Co. v. Tennessee Foundry & Mach. Co.,*** 241 S.W.2d 564, 565 (Tenn. 1951); ***R.J. Betterton Mgt. Servs., Inc. v. Whittemore,*** 733 S.W.2d 880, 882 (Tenn. Ct. App. 1987). The party asserting the defense of accord and satisfaction must prove that a creditor has agreed to accept a compromise amount in complete satisfaction of a claim. ***Stuermer v. City of Chattanooga,*** 914 S.W.2d 917, 921 (Tenn. Ct. App. 1995). To constitute an enforceable accord and satisfaction, it is essential (1) that the tendered consideration be offered to extinguish the original obligation, (2) that the debtor intended the tendered consideration as complete satisfaction for the original obligation, (3) that the debtor's intent be made known to the creditor, and (4) that the creditor accepts the tendered consideration with the understanding that it completely satisfies the original obligation. ***Lindsey v. Lindsey,*** 930 S.W.2d 553, 556-57 (Tenn. Ct. App. 1996); ***Sanders v. Sanders***, No. M1998-00978-COA-CV, 2001 WL 1660715, at *6 (Tenn. Ct. App. M.S., filed Dec. 28, 2001).

Applying these rules to the case at hand, for the Lessor to succeed in proving the defense of accord and satisfaction at the summary judgment stage of the proceedings, the Lessor had to prove

by undisputed facts that: (1) that the lease buyout payment of $160,000 was offered to extinguish the Lessor's obligation under the lease, (2) that the Lessor intended the tendered consideration as complete satisfaction of its obligation under the lease, (3) that the Lessor's intent was made known to Lessee, and (4) that the Lessee accepted the $160,000 payment with the understanding that it completely satisfied the Lessor's obligation under the lease.

Further, with respect to the matter of waiver, we note that waiver is generally defined as "the voluntary relinquishment of a known right." ***94th Aero Squadron of Memphis, Inc. v. Shelby County Airport Auth.***, 169 S.W.3d 627, 635 (Tenn. Ct. App. 2004). Thus, in order to successfully establish waiver in the matter before us the Lessor had to show that when the Lessee signed the lease termination agreement, it did so voluntarily and knew that the rights it was relinquishing were those it held under the lease.

The lease termination agreement executed by the parties in this case is very brief and provides in pertinent part as follows:

> IN CONSIDERATION of the sum of One Dollar ($1.00), cash in hand paid, and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged;
>
> We, L.B. Austin IV, individually and as Trustee, as Lessor, and GIBBY GILBERT's DRIVING RANGE, LLC, as Lessee, do hereby terminate that certain Driving Range Lease, a copy of which is attached hereto as Exhibit A.

We construe this language as being an accord between the parties that the payment of monetary remuneration by the Lessor to the Lessee will terminate all of the Lessor's obligations to the Lessee under the lease. It is undisputed, and evident from the agreement's language and execution, that pursuant to this agreement: 1) the payment offered was offered to extinguish the Lessor's obligations under the lease; 2) the Lessor intended that such payment would completely satisfy the Lessor's obligations under the lease; and 3) that this intent was made known to the Lessee. Thus, three of the four elements required to establish accord and satisfaction are not at issue. However, as to the fourth element, the Lessee argues that when it accepted the $160,000, it did not understand the conditions under which it was accepting such payment in that it was unaware of the Lessor's noncompliance with paragraph 33 of the lease.

The Lessee's argument misses the mark because in order for there to have been accord and satisfaction, the Lessee did not have to be aware of conditions required under the lease, but only of the conditions of the *lease termination agreement* itself, i.e. that upon payment of the stated

consideration, the lease would terminate, along with all of the Lessor's obligations thereunder. In order to understand that the $160,000 that was paid to the Lessee satisfied all of the Lessor's obligations under the lease, whatever they may have been, it was not necessary that the Lessee know either what the Lessor's obligations were under the lease or whether such obligations had been fulfilled by the Lessor as of the time the lease termination agreement was executed. Even if the Lessor did in fact breach provisions of the lease, such as paragraphs 33 and 34, Lessee relinquished its right to sue for any such breach upon its execution, without any reservations, of the lease termination agreement. We are guided to this latter conclusion by our decision in ***Swift v. Beaty***, 282 S.W.2d 655 (Tenn. Ct. App. 1954).

In ***Swift***, the plaintiff entered into a written agreement to sell a third party ("Moore") certain real and personal property, a portion of which the plaintiff had purchased from defendant. Moore placed earnest money in an escrow account as assurance. Thereafter, defendant informed Moore's attorney that he, defendant, held unpaid notes on the personal property, that he planned to sue the plaintiff for collection of same, and that Moore might, in effect, be buying a lawsuit if he bought such property. Based upon this information, Moore made counter offers to plaintiff which provided that the personal property be omitted from the sale or alternatively, that funds be set aside to protect Moore against loss should defendant prevail in his collection suit. Plaintiff refused these counter offers, and the sale to Moore fell through. Later, Moore and plaintiff entered into an agreement that the contract of sale be cancelled in consideration of the return of the earnest money to Moore. Plaintiff then filed suit against defendant alleging that defendant had induced breach of the contract between plaintiff and Moore. The trial court directed a verdict in favor of defendant. Upon appeal, we affirmed, stating as follows:

> [P]laintiff . . . , after the alleged breach deliberately and intentionally executed a written cancellation of his original contract with [Moore]. This written contract is absolutely binding and plaintiff . . . has released [Moore] of any liability thereunder.
>
> [Plaintiff] could have reserved his right of action, if any, against [Moore] for the alleged breach by appropriate wording in the contract of rescission or cancellation, but he did not do so.

Id. at 659.

We concluded that the plaintiff's rescission of his contract with Moore without reserving his right of action for alleged prior breach also served to discharge any claim plaintiff might have otherwise asserted against defendant for inducing the alleged breach.

Like the plaintiff in ***Swift***, the Lessee deliberately and intentionally cancelled his contract with the Lessor and failed to reserve a right of action for alleged breach of such contract. In so

doing, the Lessee waived all causes of action for breach of the lease.

In summary, it is our determination that the Lessee's agreement to terminate the lease and the payment to him by the Lessor of $160,000 as consideration for such agreement constituted accord and satisfaction, and the Lessee waived his legal rights under the lease when he executed such termination agreement. We find no genuine issue of material fact to the contrary and accordingly, it is our determination that the trial court properly granted summary judgment in favor of the Lessor.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of appeal are assessed to the appellant, Gibby Gilbert's Driving Range LLC.

_____

SHARON G. LEE, JUDGE